DISTRICT COURT, CITY AND COUNTY OF DENVER COUNTY, COLORADO 1437 Bannock St., Room 256 Denver, CO 80202 SHEEP MOUNTAIN ALLIANCE, Plaintiff, v. COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT; and JENNIFER OPILA in her official capacity as the person issuing a license on behalf of Colorado Department of Public Health and Environment; Defendants, and ENERGY FUELS RESOURCES, Indispensible Party	▲ **COURT USE ONLY** ▲
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SUR-REPLY OF DEFENDANTS COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT AND JENNIFER OPILA	

Defendants Colorado Department of Public Health and Environment and Jennifer Opila (collectively, "CDPHE"), respectfully submit their Sur-reply in the above-captioned matter. CDPHE conditionally submits this Sur-reply pending the court's ruling on the Joint Motion For Leave to File Individual Sur-Replies.

In their reply briefs, both plaintiff Sheep Mountain Alliance ("SMA") and the Towns of Telluride and Ophir (the "Towns") include documents that are outside of the record in this case and thus not properly considered. Furthermore, the conclusions that SMA and the Towns draw from those documents are wrong. In addition, the Towns' Reply Brief includes new legal authority and argument, which should have been but was not set forth in their Opening Brief.

I. Correspondence Between CDPHE and NRC Are Outside of the Record of This Appeal

A. The New Documents are Outside of the Administrative Record

As set forth in CDPHE's Answer Brief (the authority for which SMA does not dispute), the "record" against which the validity of CDPHE's decision is to be judged by this court is the record relied upon by CDPHE. *Anderson v. Colorado Dept. Personnel*, 756 P.2d 969, 978 (Colo. 1988) ('district court review of agency action is limited to the record before the agency'); *Martinez v. Board of Commissioners*, 992 P.2d 694 (Colo. App. 1999) ('the administrative record is limited to documents relied upon by the agency in making its decision'). SMA and the Towns now seek to supplement the record with correspondence that occurred one year after the agency's decision that is the subject of this appeal.[1] It is beyond obvious that this correspondence could not have been considered by CDPHE when making its decision in this case, and it would be improper to consider them when judging the

[1] The Towns even rely upon newspaper articles as authority for their position. Apart from the fact that the newspaper articles are also outside of the record, such newspaper accounts are dubious authorities at best. CDPHE could, but will not, include media accounts on how the newspapers relied upon by the Towns inaccurately reported this story and acted irresponsibly.

validity of CDPHE's decision. Therefore, the NRC letters are outside of the record and beyond the scope of this proceeding.

B. SMA and The Towns Use the Letters to Raise New Factual and Legal Issues

It is disingenuous for SMA to assert that the new materials "merely provide clarification" and that they "raise no new factual issues." *Plaintiff's Response Opposing Joint Motion for Surreply*, pp. 2, 3. Both SMA and the Towns use the letters to specifically raise the issue of whether NRC has approved the process followed in this case. Neither SMA nor the Towns argued this issue in their opening briefs; nor CDPHE nor Energy Fuels raise it in their answer briefs.[2]

It is likewise disingenuous for SMA to claim that it does not rely upon the letters for its legal argument: again, both SMA and the Towns use the letters to conclude – for the first time (but, as shown below, wrongly) that NRC has "found" and "concluded" that the license is invalid for "non-compliance" with NRC requirements and, therefore, this court should invalidate and remand the license. *SMA Reply Brief*, p. 3, *Towns Memorandum Brief in Reply*, pp. 6-8, 16. This, too, is a new issue not previously raised by any of the parties.

[2] When making this assertion, SMA grossly mischaracterizes CDPHE's argument by claiming that the new documents only "rebut" CPDHE's arguments that NRC approved CDPHE's decision on the license. *Plaintiff's Response Opposing Joint Motion for Surreply*, p. 3. CDPHE never made this argument; it only noted that NRC had as recently as 2010 approved CDPHE's *program*. Thus, SMA's argument that it is using the letters "merely to disprove" CDPHE's assertion that NRC had approved CDPHE's license decision is simply wrong. *Plaintiff's Response Opposing Joint Motion for Surreply*, p. 3.

C. The Conclusions that SMA and The Towns Draw From the Letters Are Wrong

In any event, SMA and the Towns were too quick to jump to conclusions. After noting that it had "relinquished authority" to the State of Colorado (which is consistent with CDPHE's argument that Colorado, not federal, regulations apply to licensing proceedings in Colorado), NRC recently cautioned that letters relied upon by SMA and the Towns "should not be taken to mean that NRC has formed a conclusion with respect to the validity of any individual Colorado licensing action." *See*, attached letter from NRC to CDPHE dated April 4, 2012.

II. The Towns' New Legal Argument, Which the Towns Improperly Raise For the First Time in Their Reply Brief, is Not Supported by the *Sunflower Coalition* Case

Even though SMA briefly (and incorrectly) argued in its Opening Brief that CDPHE has acted inconsistently with its past practices with regard to hearings on licenses, the Towns did not make any such argument. Now for the first time, the Towns advance in their Reply Brief the argument that CDPHE has "radically changed its policy" on hearings and must justify this change. *Towns Reply* Brief, p. 9. Moreover, the Towns (and SMA) support the argument with previously un-cited authority which is over 30 years old. Clearly, the Towns and SMA could have – and should have – included this argument and the associated legal authority in their opening briefs, but instead withheld it until their reply briefs so CDPHE and Energy Fuels would not have an opportunity to respond.

Nonetheless, the Towns' and SMA's reliance upon the case of *In Re: Sunflower Coalition*, 13 N.R.C. 847, 1981 NRC Lexis 108, pp. 1- 27 (June 24, 1981), is misplaced for several reasons and, in fact, the case supports CDPHE's arguments.

First, *Sunflower* is distinguishable because it occurred before the 1982 amendments to the NRC-Colorado Agreement which for the first time included uranium mill tailings in the agreement. Second, *Sunflower* says that hearings on licenses "need not be full, formal adjudicatory proceedings" which is exactly what SMA and the Towns advocate for in this case. 1981 NRC Lexis 108, p. 16. Third, *Sunflower* supports CDPHE's argument that NRC retains exclusive authority to evaluate Colorado's radiation program and, therefore, this court has no authority to do so. 1981 NRC Lexis 108, pp. 3, 24 ("NRC retains authority to terminate or suspend the Agreement...should the [NRC] find that…the State has not complied with one or more requirements of this section.").

Finally, *Sunflower* supports CDPHE's argument that, even if there were an issue with the state program, invalidation of the license is <u>not</u> a remedy. In *Sunflower*, NRC rejected the petitioner's request that the licenses at issue be invalidated and, quoting legislative history, stated that, under the amendments to the federal statute, "[NRC] would not have the authority to… revoke… licenses in agreement states." 1981 Lexis 108, pp. 9-10. If NRC, which retains sole authority to evaluate a state program for consistency with federal requirements, 42 U.S.C §2021(j), does not have the authority to invalidate a state license, this court does not, either.

CONCLUSION

The court should disregard the February 29 and March 6, 2012 letters from NRC as outside of the record, irrelevant to the issue before the court, and substantively wrong. The court should likewise disregard SMA's and the Towns' reliance on the *Sunflower* case for their arguments about the state's license process.

Respectfully submitted this __9th__ day of April, 2012.

JOHN W. SUTHERS
Attorney General

E-filed in accordance with C.R.C.P. 121, § 1-26; duly signed original on file with the Office of Attorney General for the State of Colorado

/s/ Jerry W. Goad

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CERTIFICATE OF SERVICE

I certify that I have duly served the within **SUR-REPLY OF DEFENDANTS COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT AND JENNIFER OPILA** upon all parties herein via LexisNexis File and Serve or, as indicated, by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this __9th__ day of __April__, 2012, addressed as follows:

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